SUPREME COURT, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5704

JEAN CHRISTIAN and VICTOR L. GREEN,

Appellants,

against

NEW YORK STATE DEPARTMENT OF LABOR, Division of Employment, its Industrial Commissioner, LOUIS L. LEVINE; UNITED STATES DEPARTMENT OF LABOR, its Secretary, PETER J. BRENNAN; UNITED STATES POSTAL SERVICE CORPORATION; its Postmaster General, ELMER T. KLASSEN; UNITED STATES CIVIL SERVICE COMMISSION; its Chairman ROBERT E. HAMPTON, and its Commissioners, JAMES E. JOHNSON and JAYNE SPAIN; UNITED STATES DEPARTMENT OF THE TREASURY; and its Secretary, GEORGE P. SCHULTZ,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES NEW YORK STATE DEPARTMENT OF LABOR AND LOUIS L. LEVINE

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Statement of the Case

Appellants are both former federal employees who were discharged from their jobs during the probationary period. Both applied for unemployment insurance. Pursuant to

5 U.S.C. § 8502, appellants' unemployment insurance claims were determined by the Department of Labor of the State of New York acting as the agent of the United States (5 U.S.C. § 8502[a]).

Pursuant to 5 U.S.C. § 8502(d):

> "A determination by a State agency with respect to entitlement to compensation under an agreement is subject to review in the same manner and to the same extent as determinations under the State unemployment compensation law, and only in that manner and to that extent."

The scope of consideration available to a State agency is sharply restricted by 5 U.S.C. § 8506(a) which provides that:

> "Each agency of the United States and each wholly or partially owned instrumentality of the United States shall make available to State agencies which have agreements under this subchapter, or to the Secretary of Labor, as the case may be, such information concerning the Federal service and Federal wages of a Federal employee as the Secretary considers practicable and necessary for the determination of the entitlement of the Federal employee to compensation under this subchapter. The information shall include the findings of the employing agency concerning—
>
> (1) whether or not the Federal employee has performed Federal service;
>
> (2) the periods of Federal service;
>
> (3) the amount of Federal wages; and
>
> (4) the reasons for termination of Federal service.
>
> The employing agency shall make the findings in the form and manner prescribed by regulations of the Secretary. The regulations shall include provision for

> correction by the employing agency of errors and omissions. Findings made in accordance with the regulations are final and conclusive for the purpose of section 8502(d) and 8502(c) of this title. . . ."

Because appellants were probationary employees at the time they were discharged, they did not receive hearings on the reasons for separation. Any hearings by the State agency which has jurisdiction over unemployment insurance claims is limited by the provisions of 5 U.S.C. § 8506(a), *supra*. That is, while the State agency may conduct all of the proceedings which it conducts for non-federal employees, it must accept as "final and conclusive" the federal agency findings.

The gravamen of appellants' complaint is that they should have been accorded hearings on the causes of their separation and that the failure to accord such hearings violates their rights to due process and equal protection of the law and also violates the statutes governing unemployment insurance claims (42 U.S.C. § 503; 5 U.S.C. §§ 8501-8506).

ARGUMENT

Appellants' complaint against the New York State Department of Labor and its Industrial Commissioner is derivative from their complaint against the Federal appellees. The State appellees are bound by the provisions of Federal law.

Appellants do not question the adequacy of the New York procedures governing the review of claims for unemployment insurance benefits (N.Y. Labor Law, §§ 500 *et seq.*). Their claim is directed at the absence of a hearing to contest the findings of reason for discharge. To the extent that they seek to have a federal agency conduct such a hearing, the State appellees are not involved; to the extent that appellants seek to have the State appellees con-

duct such a hearing, the appellees are bound by 5 U.S.C. § 8506(a) and must accept the federal agency findings as "final and conclusive". See *Matter of Fermaglich* v. *Levine*, 41 AD2d 70 (3rd Dept., 1973).

In fact, the appellants do not argue for a State hearing of the restriction of § 8506(a). Their brief is directed at what should take place at the federal agency level before any State proceedings take place; the controversy they allege involves the procedure by which the federal agency advises the State pursuant to 5 U.S.C. §8506 of the reasons for discharge.

Accordingly, appellants have no real controversy with the State appellees who are bound to follow the federal statutory scheme with respect to former federal employees whose unemployment insurance is paid for by the federal government.

CONCLUSION

The decision below should be affirmed with respect to appellees New York State Department of Labor and Louis L. Levine.

Dated: New York, New York, August 1, 1973.

Respectfully submitted,

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